

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Consumers Energy Company
Entergy Nuclear Palisades, LLC

Docket Nos. EC06-155-001

Entergy Nuclear Palisades, LLC
Entergy Nuclear Power Marketing, LLC

ER06-1410-001
ER06-1410-001

ORDER GRANTING CLARIFICATION

(Issued July 26, 2007)

1. In this order, the Commission addresses Edison Sault Electric Company's and Cloverland Electric Cooperative's (together, Edison Sault/Cloverland) request for clarification¹ of the order in which the Commission set for hearing the application filed under section 203 of the Federal Power Act (FPA)² by Entergy Nuclear Palisades, LLC (Entergy Palisades) and Consumers Energy Company (Consumers) (together, Applicants).³ As discussed below, we grant the request for clarification.

¹ Although Edison Sault/Cloverland filed a request for clarification under Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2007), we note that this filing was filed within the period for rehearing requests. Therefore, we will treat it as a rehearing of the Commission decision pursuant to Rule 713, 18 C.F.R. § 385.713 (2007).

² 16 U.S.C. § 824b (2000), *amended by* Energy Policy Act of 2005 § 1289, Pub. L. No. 109-58, 119 Stat. 594, 982-93 (2005) (EPAAct 2005).

³ *Consumers Energy Co.*, 118 FERC ¶ 61,143 (2007) (*Hearing Order*).

Background

2. Applicants filed an application for Consumers to sell, and Entergy Palisades to acquire, the 798 megawatt (MW) Palisades Nuclear Power Plant (Palisades Facility) and its associated jurisdictional facilities. In the *Hearing Order*, the Commission found that the proposed transaction raised an issue of material fact as to whether it might have an adverse effect on rates and thus may not be consistent with the public interest. Therefore, the Commission set the application for a trial-type evidentiary hearing on that issue.⁴

3. However, the Commission stated that there would be no need for such a hearing if Consumers committed to hold Edison Sault harmless from rate increases until after an existing power sales contract between Consumers and Edison Sault becomes open for renegotiation. That contract allows price renegotiation or termination. We viewed this as an open season, which the Commission has found to be acceptable ratepayer protection.⁵ The Commission directed Consumers to make a filing within 15 days of the date of the *Hearing Order* if it chose that alternative. On March 6, 2007, Consumers so notified the Commission.

4. The Commission also made certain findings regarding Applicants' proposed use of the Palisades Decommissioning Fund. As part of the proposed transaction, Applicants stated that Entergy Palisades will assume responsibility for decommissioning the Palisades Facility in accordance with Nuclear Regulatory Commission (NRC) regulations. They noted that Consumers will transfer not less than \$250 million of the Palisades Decommissioning Fund to Entergy Palisades to be used for decommissioning the Palisades Facility. However, subject to NRC and Internal Revenue Service (IRS) approval, Consumers proposed to retain a portion of the Qualified Fund and all of the Non-Qualified Fund that make up the Palisades Decommissioning Fund.⁶ Consumers stated that it will use \$11 million of the Non-Qualified Fund attributable to Commission-jurisdictional rates (Jurisdictional Amount) for decommissioning of its Big Rock Point Nuclear Power Plant (Big Rock Facility).⁷

⁴ *Id.* P 1, 33-34.

⁵ *Id.* P 32.

⁶ *Id.* P 8. The Qualified Fund meets the requirements of Internal Revenue Code Section 468A and Treas. Reg § 1.468A-5. *Id.* n. 17.

⁷ According to the Applicants, the Big Rock Facility has been completely dismantled and its components removed from the site. *Id.* P 7.

5. In the *Hearing Order*, the Commission authorized Consumers to use part of the Palisades Decommissioning Fund to cover shortfalls in the decommissioning of the Big Rock Facility, subject to the outcome of the NRC License Proceeding.⁸ Commission regulations state that: “[a]bsent the express authorization of the Commission, no part of the assets of the [decommissioning] [f]und may be used for, or diverted to, any purpose other than to fund the costs of decommissioning the power plant to which the [f]und relates” (emphasis added).⁹ In this instance, the Commission found that the use of one fund for Consumers’ two facilities is acceptable because the same group of ratepayers would otherwise pay the \$50 million deficit in the decommissioning fund for Consumers’ Big Rock Facility.¹⁰

Request for Clarification

6. On March 23, 2007, Edison Sault/Cloverland filed a request for clarification as to whether the *Hearing Order* relieves Consumers of its obligation to make refunds to wholesale customers that contributed to the Palisades Decommissioning Fund. While they do not dispute Consumers’ use of the Jurisdictional Amount for decommissioning the Big Rock Facility, they say that there may be surplus amounts in the Palisades Decommissioning Fund that should be refunded to customers.¹¹ They note that as the ratepayers’ fiduciary, Consumers has an obligation to refund to its wholesale customers who contributed to decommissioning funds any amounts not used for decommissioning, in accordance with Commission regulations.¹² Edison Sault/Cloverland are concerned about statements made by Applicants in an earlier answer in this proceeding where Applicants suggested that Consumers is relieved of this obligation because (1) it is not possible to identify the portion of the revenues collected from customers that is

⁸ *Id.* P 50 and n 65.

⁹ *Id.* P 49, *citing* 18 C.F.R. § 35.32(a)(6) (2007).

¹⁰ *Id.* P 49-50.

¹¹ Edison Sault/Cloverland’s Request for Clarification at 3-4.

¹² *Nuclear Plant Decommissioning Trust Fund Guidelines*, Order No. 580, FERC Stats. & Regs. ¶ 31,023 at 31,348, 31,353 (1995) (Order No. 580); *see also* 18 C.F.R. § 35.32(a)(7) (2007).

attributable to decommissioning costs;¹³ and (2) refunds from any surplus in the Decommissioning Funds would be retroactive ratemaking.¹⁴ Because the Commission did not address this issue in the *Hearing Order*, that a surplus of the Jurisdictional Amount may exist, Edison/Sault/Cloverland seek clarification on this point.

7. Edison Sault/Cloverland also request the Commission to ensure that disposition of any surplus decommissioning funds is not inappropriately made. They ask the Commission to clarify that the Applicants must: (1) advise the Commission and the ratepayers of the outcome of the NRC License Proceeding; (2) refund to Consumers' wholesale ratepayers their share of any surplus amounts not used for decommissioning; and (3) make transparent how refund calculations were made.¹⁵

Discussion

Procedural Matters

8. On April 9, 2007, Applicants answered Edison Sault/Cloverland's request for clarification. On April 19, 2007, Edison Sault/Cloverland filed an answer to Applicants' answer.

9. Rule 713(d) of the Commission Rules of Practice and Procedure, 18 C.F.R. § 385.713(d), prohibits answers to rehearing requests. Accordingly, we will reject the answers filed by Edison Sault/Cloverland and Applicants.

Commission Determination

10. In the *Hearing Order*, the Commission authorized the Applicants to use the Jurisdictional Amount to complete the decommissioning of the Big Rock Facility, subject to the outcome of the NRC License Proceeding. The Commission noted that its

¹³ Applicants noted that “it has not been possible to specifically identify the portion, if any, of the revenues collected from these customers that is attributable to decommissioning costs.” Applicants’ October 11, 2006 Answer at 10.

¹⁴ Applicants argued that Edison Sault/Cloverland are seeking a retroactive refund and that it would be “unlawful for the Commission to order refunds of rates which were fully charged, and fully collected, years ago.” Applicants’ October 11, 2006 Answer at 10-11.

¹⁵ Edison Sault/Cloverland’s Request for Clarification at 4-5.

regulations generally require each fund to stand alone (1) to ensure the sufficiency of individual decommissioning funds; and (2) to avoid the possibility that one group of ratepayers will subsidize another group.¹⁶ However, the regulation also provides that the Commission may authorize an exception, which is what we did in the *Hearing Order*. The Commission determined that allowing the use of the Jurisdictional Amount to cover any shortfalls in the decommissioning of another Consumers facility is acceptable. The Commission noted that the same group of ratepayers will fund the \$50 million deficit in the decommissioning fund for the Big Rock Facility, so one group of ratepayers will not be subsidizing another. Further, using the Jurisdictional Amount this way will actually lower the amount that will need to be collected from ratepayers in the future for decommissioning the Big Rock Facility.

11. We emphasize that utilities must refund any surplus decommissioning funds to customers, in a manner determined by the Commission.¹⁷ As fiduciaries, utilities are not permitted to profit from decommissioning fund assets.¹⁸ Such refunds are the obligation of the utility from the outset, and requiring them is not retroactive ratemaking.¹⁹ Consistent with our regulations, we direct Consumers to return to customers any surplus of the Jurisdictional Amount after completing the decommissioning of the Big Rock Facility.

12. We also note that the Commission's authorization of the use of the decommissioning funds for the Big Rock Facility was conditioned on the outcome of the NRC License Proceeding, which will determine whether the Palisades Decommissioning Fund is adequate to provide for the decommissioning of the Palisades Facility.²⁰ Applicants stated in their application that they will inform the Commission of the

¹⁶ *Hearing Order*, 118 FERC ¶ 61,143 at P 49.

¹⁷ *Id.*

¹⁸ Order No. 580, FERC Stats. & Regs. ¶ 31,023 at 31,353.

¹⁹ See, e.g., *PPL Energy Plus, LLC*, 99 FERC ¶ 61,257, at 62,115 (2002) (holding that charges based on a pre-existing obligation do not constitute retroactive ratemaking); *New England Power Co.*, Opinion No. 379, 61 FERC ¶ 61,331, at 62,212, 62,217 (1992) (affirming that recovery of transition obligation costs does not constitute retroactive ratemaking), *reh'g denied*, 65 FERC ¶ 61,036, at 61,394, 61,397-401 (1993).

²⁰ *Hearing Order*, 118 FERC ¶ 61,143 at P 50.

outcome of the NRC License Proceeding.²¹ However, Applicants provided no information in the Consummation Filing²² or other filings. Accordingly, Applicants are directed to inform the Commission of the outcome of the NRC License Proceeding by filing the order approving the NRC license transfer, including the amount of the decommissioning fund transferred to Entergy Palisades that the NRC considered adequate, within 30 days of the date of this order. We also clarify that within one year from the date of this order, Consumers must either (a) demonstrate that no surplus Jurisdictional Amount exists or, (b) if a surplus Jurisdictional Amount does exist, file a refund plan consistent with section 35.32(a)(7) of the Commission's regulations. Such a refund plan must be just, reasonable, and not unduly discriminatory, as section 205 of the FPA requires.

13. In addition, Applicants in their Consummation Filing stated that the non-Qualified Fund, rather than the Qualified Fund, was transferred to Entergy Palisades. They state that the "value of the transferred nuclear decommissioning funds to Entergy Palisades was the same as anticipated in the asset sales agreement." Under the Asset Sales Agreement, the transfer was to be no less than \$250 million subject to additional IRS Letter Agreements and other adjustments. It is not clear how much was actually transferred to Entergy Palisades. Accordingly, Applicants are directed to report within 30 days of the date of this order the amount transferred from the Palisades Decommissioning Fund to Entergy Palisades for use as a decommissioning fund.

The Commission orders:

(A) The request for clarification is hereby granted, as discussed in the body of this order.

(B) Applicants are directed to inform the Commission of the outcome of the NRC License Proceeding within 30 days of the date of this order, as discussed in the body of this order.

(C) Consumers is directed to either demonstrate that no surplus Jurisdictional Amount exists or submit a refund plan for any surplus Jurisdictional Amount within one year of the date of this order, as discussed in the body of the order.

²¹ Section 203 Application at 25.

²² On April 20, 2007, the Applicants notified the Commission that they had consummated the transaction (Consummation Filing).

(D) Applicants are directed to report the amount transferred from the Palisades Decommissioning Fund to Entergy Palisades for use as a decommissioning fund within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.